AZIZ SATAR MAT DALI v. PP

HIGH COURT MALAYA, TAIPING
NOOR RUWENA MD NURDIN JC
[CRIMINAL APPEAL NO: AB-41S-8-08-2020]
12 JULY 2022

Abstract – *The Magistrate, in finding that the appellant was careless by driving in a dangerous manner when he failed to see the presence of the motorcycle driven by the deceased before he departed into the deceased's lane, had committed an error of law by placing a greater burden on the defence to prove his innocence when in law, he needed only to raise a reasonable doubt on the prosecution's case; he is not required to prove his innocence beyond reasonable doubt. In this case, both the appellant and the deceased were found to be careless and negligent on the road. The appellant had a complete defence to a charge under s. 41(1) of the Road Transport Act 1987 despite the death of the deceased as the charge is not one of causing death but of driving dangerously or recklessly. The appellant's conviction was thus substituted with one under s. 43(1) of the Act as the evidence led by the prosecution could not support a conviction under the more serious charge of s. 41(1).*

ROAD TRAFFIC: *Accident – Reckless driving – Causing death – Driver found guilty for offence under s. 41(1) of Road Transport Act 1987 – Appeal against conviction and sentence – Whether ingredients of charge proved – Whether driver drove in manner which, having regard to all circumstances, dangerous to public – Whether defence raised reasonable doubt on prosecution's case – Burden of proof – Whether both driver and deceased found to be careless on road – Whether conviction of driver ought to be substituted for conviction under s. 43(1)*

The appellant was charged for an offence punishable under s. 41(1) of the Road Transport Act 1987 ('Act') for the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances was dangerous to the public, causing the death of the deceased. On 8 June 2018, the deceased was travelling to his workplace at DIY Kuala Kangsar on a motorcycle. Upon reaching Hardware Jerlun at KM 5, a motor lorry from the opposite direction suddenly turned right into the hardware shop area allegedly without giving any signal indicating its intention to do so. The deceased could not avoid the encroaching vehicle in time and hit the lorry on its front left side. The motorcycle slid under the lorry while the deceased fell backwards. The collision was witnessed by the deceased's friend, PW5, who was riding another motorcycle about 10 to 15 meters behind. Pursuant to the collision, the deceased died on the spot. The appellant, at the Magistrate's Court, claimed trial to the charge. The Magistrate found the appellant guilty where he was convicted under s. 41(1)

of the Act and sentenced to three years' imprisonment as well as a fine of RM5,000 and in default six months' imprisonment. His driving licence was also suspended for a period of three years. The appellant appealed against the conviction and sentence to the High Court. The appellant submitted that there were numerous errors in the Magistrate's decision, such as, *inter alia* (i) that the Magistrate clearly fell into error when she placed a higher burden on the appellant to answer the charge when he survived the fatal accident; (ii) the Magistrate had placed much importance on the uncorroborated evidence of PW5 whom the appellant claimed was not a credible witness; (iii) there were many gaps in the prosecution's case such as no toxicology test was done on the deceased's blood sample and the failure to conduct a post-mortem, raising a reasonable doubt on the actual cause of death; and (iv) the Magistrate disregarded the police report lodged by the appellant which was a contemporaneous document containing the truth of what transpired on that fateful day. The appellant submitted further that at most, he was negligent and should not have been found guilty under s. 41(1) of the Act. Alternatively, the court was urged to exercise its discretion and to substitute the conviction to that under s. 43(1) of the Act instead as the evidence led by the prosecution could not support a conviction under the more serious charge of s. 41(1) due to the numerous gaps in the prosecution's case. According to the appellant, he had taken all reasonable care when he made that turn into the hardware shop area to make a delivery there and he had indicated that he was going to turn right by signalling right. Despite that, he did not see the motorcycle driven by the deceased suddenly coming into his path; that was basically the appellant's defence. The appellant submitted that he had no intention at all to cause the accident and the death of the deceased.

Held (allowing appeal in part):

(1) It is trite that the ingredients to be proved in this case are (i) person who; (ii) by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public; and (iii) causes the death of a person. It was established without a doubt that the appellant had driven the motor lorry on that fateful day and he was involved in an accident with the deceased. Therefore, the first ingredient of the offence had been proved. (paras 17 & 18)

(2) PW2, the pathologist, was adamant in her evidence that a post-mortem was unnecessary because she was able to determine the cause of death, namely, 'severe head injury with suspected cervical fracture secondary to motor vehicle accident.' PW2 arrived at the conclusion after conducting an external physical examination of the deceased and concluded that the injuries sustained were consistent with a motor

vehicle accident. The deceased also had no comorbidity. The deceased had died due to head injuries sustained in a motor vehicle accident. The fact that a full post-mortem was not conducted was not fatal to the prosecution's case. The police's failure to send the deceased's blood sample for toxicology tests was also not fatal to the prosecution's case. There was also no evidence to suggest that the deceased was under the influence of alcohol or drugs because even the appellant did not see the deceased until his motorcycle hit the lorry. This was pure speculation without more, but there must be some evidentiary basis to raise this as reasonable against the prosecution's case. In the absence of such evidence and premised on the above consideration, the deceased was found to have died due to injuries sustained in a motor vehicle accident. Therefore, the prosecution had proved the third ingredient of the charge. (paras 20, 22-24)

(3) The prosecution maintained that the motorcyclist had the right of way, but the appellant was also on the main road wanting to turn into a slip road on his right. The deceased should always keep a sharp look out and drive cautiously at all road junctions, and in this case, he was approaching the slip road leading to the hardware store. The absence of any brake marks did not indicate that he was riding at a slow pace or that he could not have avoided the lorry. The court could only draw an inference that based on the sketch plan, and the point of impact on the lorry as well as the position of the deceased's body on the road, the motorcycle was not going at 50 to 60 km/hour then. It had to be faster than what PW5 testified. The deceased's left part of the body collided into the lorry's outer cabin in what may have been a last-minute attempt to swerve to the right. The position of the lorry which was fully across the left lane and the appellant immediately stopping his vehicle upon feeling the impact of the collision led this court to conclude that there must be some truth to the appellant's version. The appellant may or may not have given that signal to turn right, but there was evidence that he slowed down and then turned into the slip road. The silent evidence in P3A (the photograph) could only point to one conclusion that there was negligence on the part of the deceased as well when seeing the lorry fully across the left side of the road, he did not slow down or take proper steps to avoid the lorry. The Magistrate's conclusion that the appellant's failure to signal right and to ensure that there was no on-coming traffic was dangerous driving in the circumstances of the case, could not be sustained. (paras 38 & 39)

(4) The Magistrate fell into error by not making a full evaluation of the prosecution's case. If evidence was properly evaluated, the Magistrate would have called evidence on the lesser charge of s. 43(1) instead. The slightly hilly terrain of the accident site had to a certain extent limited the appellant's view as he was going uphill whereas PW5 had a better

line of sight as they (he and the deceased) were going slightly downhill. The line of sight of the appellant was roughly 10 to 20 meters ahead because of the slight bend and uphill terrain. This fact supported the appellant's defence that he had determined there was no on-coming traffic after he stopped and signalled to turn right. This court gave the benefit of the doubt to the appellant as looking at the lorry, it was quite a big sized five tons vehicle and the signal light position on the lorry's outer cabin was located on its lower part almost at the side. The appellant had raised a reasonable doubt in that the appellant had a limited vision because of the slight bend and uphill terrain. The defence only needed to raise a reasonable doubt that the signal to turn right was unlikely to be seen by on-coming traffic when the position of the lorry was already across the left lane of that road. (paras 43 & 49)

(5) The Magistrate, in finding that the appellant was careless by driving in a dangerous manner when he failed to see the presence of the motorcycle before he departed into the deceased's lane, had committed an error of law when making the statement because she had placed a greater burden on the defence to prove his innocence when in law, he needed only to raise a reasonable doubt on the prosecution's case. The defence's duty to cast a reasonable doubt on the prosecution's case under s. 41(1) of the Act had been made out successfully. He was not required to prove his innocence beyond reasonable doubt. Moreover, the appellant's testimony was not materially contradicted by his own evidence or that of the prosecution's. Some of the prosecution's evidence also corroborated the appellant's testimony in court. This was a suitable case for appellate interference because the Magistrate had failed to properly appreciate the defence case in light of the gaps in the prosecution's case. (para 51)

(6) The appellant was careless (not reckless) when he made the turn into the slip road. The appellant thought he would be able to turn right by just slowing down a bit (rather than fully come to a stop), and then turning into the slip road. It may well have been that he did not see the motorcycle coming because otherwise he would not have turned right if he had seen it coming from the opposite direction. The deceased was also careless because having the advantage of the view coming down the slope, he should have been able to see a big lorry in front of him at the material time and slowed down by braking or taking steps to avoid it. (para 52)

(7) The appellant had a complete defence to a charge under s. 41(1) of the Act despite the death of the deceased. The charge is not one of causing death but of driving dangerously or recklessly. The Magistrate had imposed an extremely high burden of proof on the appellant and the judgment was clouded due to the deceased's death. Thus, the conviction

of the appellant was substituted for a conviction under s. 43(1) of the Act. The accused was sentenced to a fine of RM10,000, in default of payment, one year imprisonment. The maximum fine of RM10,000 would serve as a deterrence to him and other road users to be more careful on the road when driving a motor vehicle. Given his good driving record and no previous conviction, the appellant's age factor, being the sole bread winner of his family and the fact that he had shown remorse and considering also that it was not a pre-meditated offence, a long custodial sentence would not be in the best interest of justice for all. (paras 56-59)

Case(s) referred to:
Goh Kheng Seong v. PP [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408 HC ***(refd)***
Gunasegaran Singaravelu v. PP [2009] 7 CLJ 613 HC ***(refd)***
Lim Lim v. The King [1937] 1 MLJ 81 ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ng Beng Kok v. PP [2017] 7 CLJ 157 CA ***(refd)***
Poleon Ajan v. PP [2010] 10 CLJ 420 HC ***(refd)***
PP v. Hew Yew [1971] 1 LNS 110 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Wan Khairil Wan Isa [2007] 9 CLJ 557 HC ***(refd)***
PP v. Zulkifli Omar [1998] 1 CLJ 1079 HC ***(refd)***
Tan Thang Sang v. PP and Choong Sze Foong v. PP [1973] 1 LNS 158 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Road Transport Act 1987, ss. 41(1), (4), 42, 43(1)
Road Traffic Ordinance 1958, s. 34A(1)

For the appellant - Mohd Sariman Mat Serat; M/s Sariman & Goik
For the respondent - Sariza Ismail; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Ruwena Md Nurdin JC:

[1] This is an appeal to the Court of Appeal by the Public Prosecutor against the decision of this court that was delivered on 12 May 2022, whereby the court had dismissed the appeal against conviction of Aziz Satar bin Mat Dali's appeal from the Magistrate's Court (hereinafter referred to as "the appellant") but substituted the conviction to a lesser charge and sentenced him accordingly. The court had found the appellant guilty of an offence under s. 43(1) of the Road Transport Act 1987 (Act 333) ("the Act") and convicted him. He was sentenced to the maximum fine of RM10,000 in default of which he would be imprisoned for a period of one year and his driving licence was endorsed accordingly.

A **Background**

[2] The appellant was charged for an offence punishable under s. 41(1) of the Act which read as follows:

> Bahawa kamu pada 08/06/2018 jam lebih kurang 1440 petang diKM5 Jalan Kuala Kangsar - Manong (hadapan Hardware Jerlun) di dalam daerah Kuala Kangsar di dalam Negeri Perak sebagai pemandu m/lori no PHC 449 telah memandu kenderaan tersebut atas jalan raya dengan cara yang setelah mengambil perhatian tentang segala hal keadaan adalah merbahaya kepada orang awam sehingga menyebabkan kematian ke atas penama Muhammad Zulkhairi bin Zulkifli no. K/P 961121-03-5625. Oleh yang demikian itu, kamu telah melakukan kesalahan di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah peruntukan yang sama.

[3] The appellant at the Magistrate's Court claimed trial to the charge. The trial commenced on 19 November 2019. The prosecution called six witnesses to prove the charge and at the end of the prosecution case, defence was called after a *prima facie* case was made out against him. The appellant was the sole witness for his case. At the end of the defence case, submissions were made and on 27 July 2020, the learned Magistrate found the appellant guilty where he was convicted under s. 41(1) and sentenced to three years imprisonment as well as a fine of RM5,000, and in default, six months' imprisonment. His driving licence was also suspended for a period of three years. The appellant appealed against the conviction and sentence to the High Court. The appeal was heard on 9 February 2022 and 14 March 2022.

Facts Of The Case

[4] On 8 June 2018, Muhammad Zulkhairi bin Zulkifli ("the deceased") was travelling on Jalan Kuala Kangsar – Manong from home to his workplace at DIY Kuala Kangsar on a motorcycle bearing registration number AKC 7219. Around 2.40pm upon reaching Hardware Jerlun at KM 5, a motor lorry (registration number PHC 449) from the opposite direction suddenly turned right into the hardware shop area allegedly without giving any signal indicating its intention to do so. The deceased could not avoid the encroaching vehicle in time and hit the lorry on its front left side. The motorcycle slid under the lorry while the deceased fell backwards. The collision was witnessed by the deceased's friend, Muhammad Alif Haikal bin Salim (PW5) who was riding another motorcycle about 10 to 15 meters behind. Pursuant to the collision, the deceased died on the spot.

[5] Section 41(1) of the Act provides:

> (1) Any person who, by driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances or (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous

to the public, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than two years and not more than ten years and to a fine of not less than five thousand ringgit and not more than twenty thousand ringgit.

The Appeal

[6] During the hearing of the appeal on, counsel for the appellant submitted that there were numerous errors in the Magistrate's decision when she did not take into consideration many facts which were in favour of the appellant and he had raised a reasonable doubt against the prosecution case. It was the appellant's contention that the Magistrate clearly fell into error when she placed a higher burden on the appellant to answer the charge when he survived the fatal accident. Moreover, the learned Magistrate had placed much importance on the uncorroborated evidence of PW5 whom the appellant claimed was not a credible witness. The appellant's point of contention with regard to the evidence of SP5 was that he was a witness who appeared out of nowhere and may have reasons only best known to himself for testifying against the appellant.

[7] Despite many gaps in the prosecution case such as PW5's evidence not recorded on the day of the accident, CCTV footage not taken by the investigating officer ("the IO"), no statement taken from the workers of the hardware shop who may have witnessed the accident and no toxicology test done on the deceased's blood sample (to prove that he was not under the influence of alcohol or drugs), and the line of sight of the appellant as well as the topographical condition of the accident area, the learned Magistrate disregarded the police report lodged by the appellant which was a contemporaneous document containing the truth of what transpired on that fateful day. Further, the appellant had testified and gave evidence under oath. He had told the court that he was making a delivery of some building materials to Hardware Jerlun that afternoon and it was a heavy load which the lorry was carrying. With that load, the appellant testified that he could not have turned fast and driven in a dangerous manner. Surely his testimony was more credible than that of PW5 whom was allegedly not a truthful witness. Counsel for the appellant submitted further that at most, his client was negligent and should not have been found guilty under s. 41(1) of the Act. Having said that, the learned Magistrate was wrong to have rejected the appellant's defence and did not make a finding on it but instead preferred the prosecution version, especially PW5's evidence.

[8] Another ground for the appeal was that the Magistrate failed to consider that the post-mortem was not done as the pathologist, PW2, stated she had only conducted external physical checks on the body of the deceased. The failure of the IO to send the deceased's blood sample for testing had raised a reasonable doubt on the actual cause of death more so when the death

A certificate, burial permit as well as the PUSPAKOM report were not tendered by the prosecution. It was submitted that these documents would have assisted the court in arriving at the truth. Learned counsel for the appellant also attacked the accuracy of PW5's evidence tested under cross-examination. The court will deal with this issue later in the grounds of
B judgment.

[9] Alternatively, the court was urged to exercise its discretion and substitute the conviction to that under s. 43(1) of the Act instead as the evidence led by the prosecution could not support a conviction under the more serious charge of s. 41(1) due to the numerous gaps in the prosecution
C case which had been detailed in the appellant's 18 grounds of appeal in the petition of appeal that can be found in pp. 7 to 10 of the Record of Appeal (Volume I). According to the appellant, he had taken all reasonable care when he made that turn into the hardware shop area to make a delivery there and he had indicated that he was going to turn right by signalling right.
D Despite that, he did not see the motorcycle driven by the deceased suddenly coming into his path; that was basically the appellant's defence. Being a very experienced lorry driver who was familiar with the area, he had no intention at all to cause the accident and the death of the deceased. Learned counsel submitted the case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991]
E 1 CLJ (Rep) 311; [1991] 3 MLJ 169 where it was held:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused is sufficient. It is not however wrong for the court to be convinced that the defence version is true, in which case the court must order an
F acquittal. In appropriate cases, it is also not wrong for the court to conclude that the defence story is false or unconvincing, but in that instance, the court must not convict until it asks a further question, even if that court does not accept or believe the defence version, does it nevertheless raise reasonable doubt to his guilt? It is for this reason that in dealing with defence story or explanation, the majority of judges rightly
G prefer to adopt straightaway the legally established "reasonable doubt test" rather than to delve in the "believable and "convincing" test before applying the "reasonable doubt" test.

[10] The prosecution at the Magistrate Court submitted that the prosecution had established its case against the appellant on the standard of
H proof beyond reasonable doubt under s. 41(1) of the Act. The prosecution had established all the ingredients of the offence and the learned Magistrate was right in calling for his defence and later convicting him based on the evidence of the prosecution witnesses. It was submitted that the appellant was driving a motor lorry and owed a greater duty of care to other road users. By driving in the manner which he did, *ie*, obstructing the deceased's right
I of way, the appellant had created a dangerous situation to other road user, namely the deceased. It was alleged that he had failed to exercise care when

he turned into the hardware store area without stopping or indicating his intention to do so. Therefore, the deceased could not have avoided hitting the vehicle driven by the appellant.

[11] It was also the prosecution's contention that failure to submit the PUSPAKOM report was not fatal to its case as there was evidence from PW5 that the motorcycle was in good condition when the deceased rode it prior to the accident. Further, the fact that no toxicology test was conducted on the deceased's blood sample or that the death certificate not produced did not dent the prosecution's case. There was evidence from PW6 on the reasons for not producing the documents during the trial. In this regard, PW6 testified that it was unnecessary as there was no evidence to indicate that the deceased was riding his motorcycle under the influence of drugs or alcohol. Moreover, according to PW6, her evidence about the safe distance being 100m for the lorry to make a turning into the hardware store area was based on common sense. PW6 had testified that the appellant should have been more careful when taking that turn despite agreeing with the appellant's question that there was a possibility his line of sight was limited to 10 to 15m at that time due to the road condition. PW2 also testified that the deceased did not have any co-morbidity which could have caused his death but rather the injuries sustained were consistent with that of a motor vehicle accident.

[12] On the issue of PW5's testimony, it was submitted that he was present at the site of the accident and had witnessed it. He was interviewed by PW6 at the material time and it was not fatal to the prosecution case that PW5 only had his written statement taken down by PW6 about two weeks after the accident.

The Ingredients Of The Charge

[13] The Court of Appeal in the case of *Ng Beng Kok v. PP* [2017] 7 CLJ 157 decided that the elements of the offence under s. 41(1) of the Act were as follows:

> The above section, in our view, creates three distinct offences, namely:
>
> (a) driving a motor vehicle recklessly;
>
> (b) driving a motor vehicle at speed; or
>
> (c) driving a motor vehicle in a manner which, having regard to all the circumstances (including nature, condition and size of the road, and the amount of traffic, which is or might be expected to be on the road) is dangerous.

[14] In an earlier case of *PP v. Wan Khairil Wan Isa* [2007] 9 CLJ 557, the High Court had also laid down the ingredients of:

A The essential ingredients then of the offence under s. 41(1) of the Act are:

(a) a person who,

(b) by driving a motor vehicle recklessly; or

(c) by driving a motor vehicle at a speed; or

B (d) by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public;

(e) causes the death of person.

C **[15]** The High Court later in the case of *Poleon Ajan v. PP* [2010] 10 CLJ 420; [2010] 6 MLJ 136 made a distinction in the two categories of offences under s. 41(1) of the Act which attracted the same punishment, one being dangerous driving and the other, reckless driving. The High Court discussed that reckless driving was a more serious offence than dangerous driving; case D laws had decided that the ingredients of each category differed from the other, the distinction maybe fine but they were still obviously different. The learned judge stated:

Reckless driving

E To be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it (per Vincent Ng J in *Public Prosecutor v. Zulkifli bin Omar* [1998] 6 MLJ 65).

F Dangerous driving

(1) In a case of dangerous driving, the prosecution must establish that:

(a) a situation created by the accused is dangerous, *eg*, turning right into the said road without stopping to give way to through traffic; and

G (b) when creating such situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner of driving and relevant circumstances (per Raja Azlan Shah) (now HRH the Sultan of Perak) in *Ramiah v. Public Prosecutor* [1972] H 2 LJ 258 at p. 258. The Appellant submitted that by failing to appreciate the principle of law governing the offence of reckless or dangerous driving, the honourable magistrate had misdirected himself as to whether the evidence in the present case was sufficient support the finding of either dangerous I driving or the more serious category of reckless driving. (per Low Hop Bing J (as he then was) in *Public Prosecutor v. Ong Kia Chan* [2006] 7 MLJ 230; [2006] 4 CLJ 334). (emphasis added)

[16] In applying the principles of the above cases, the learned Magistrate in the present case stated that the court needs to decide:

(i) whether the appellant at the material time was driving in a dangerous or reckless manner;

(ii) whether the death of the deceased was caused by the dangerous or reckless driving of the appellant.

Findings Of The Court

[17] This case was categorised by the prosecution as dangerous driving rather than reckless driving and it was also the line of reasoning taken by the learned Magistrate. Applying the case laws above, it is trite that the ingredients to be proved in this case are that:

(i) person who;

(ii) by driving a motor vehicle in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public; and

(iii) causes the death of person.

[18] In respect of the first ingredient, it was established without doubt that the appellant had driven the motor lorry on that fateful day and he was involved in an accident with the deceased. Therefore, the first ingredient of the offence had been proved. The second ingredient was did he drive the lorry in a manner which, having regard to the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road), was dangerous to the public? And for the third ingredient, as a consequence of that manner of driving, did the appellant cause the death of the deceased?

[19] The second ingredient is the manner in which the appellant drove the motor vehicle was dangerous to the public. As stated above in the *Poleon Ajan*'s case, the prosecution must establish that the accused created a dangerous situation. In the present case, the dangerous situation was that the appellant had turned right into the said road allegedly without stopping to give way to through traffic and in creating that situation the appellant was at fault. To answer this question, it is necessary to turn to the evidence adduced by the witnesses as well as from the body of silent evidence gathered by PW6 in her investigations. However, before evaluating the evidence in respect of the second ingredient, the court opines it is best to go on to consider the third ingredient first to determine whether the death of the deceased was caused by the accident on 8 June 2018.

[20] The court scrutinised the evidence of PW2 as the appellant contended that there was a doubt in the prosecution case by its failure to prove that the deceased actually died due to the motor vehicle accident. PW2 was cross-examined at length in regard to her qualification, her examination on the deceased's remains, her failure to conduct a post-mortem on the remains and failure to conduct a toxicology test on the deceased's blood sample. Reference was also made to the photographs of the deceased's remains taken by PW4 at P3G and P3H (Record of Appeal Volume III). Noted that PW2 was adamant in her evidence that a post-mortem was unnecessary because she was able to determine the cause of death, namely, "severe head injury with suspected cervical fracture secondary to motor vehicle accident".

[21] The witness testified that:

> Ada kecacatan di bahagian kepala dan muka dari segi struktur rupa dan muka dengan ada banyak luka-luka di muka. Selain itu ada kecacatan di tulang leher si mati dan mendapati pendarahan yang berterusan daripada hidung dan telinga.
>
> Tangan kanan tidak cedera. Di tangan kiri ada kecacatan di pergelangan tangan dan ada luka. Di bahagian kanan kaki tidak cedera. Di kiri kaki ada kecacatan di peha iaitu tulang peha patah, tidak selari dan ketidaksamaan ukuran di kedua-dua belah kaki iaitu kiri lebih pendek.
>
> Bahagian lutut kiri memang ada luka. Luka yang agak dalam.
>
> Kemudian selepas saya memeriksa luaran si mati, saya telah membuat rumusan bahawa si mati telah meninggal dunia akibat kecederaan teruk di bahagian kepala.
>
> Ya, kecederaan teruk di bahagian kepala boleh sebabkan kematian kepada si mati.

[22] PW2 arrived at the conclusion after conducting an external physical examination of the deceased and concluded that the injuries sustained were consistent with a motor vehicle accident. It was also her evidence that the deceased had no co-morbidity as was confirmed by the father of the deceased, PW3. The appellant challenged the good doctor on the injuries to the facial/head part where it was put to the witness they could not have been from the accident. This was because the photographs (exhs. P3G and P3H in the Record of Appeal Volume III) showed the deceased's face was not deformed. Hence, PW2's conclusion in P2 (the post-mortem report) was unsupported by the physical condition of the deceased as shown in the photographs, particularly where the alleged point of impact was the face and upper part of the deceased's body hitting the left front portion of the lorry. The deceased also sustained deep injuries at the left knee.

[23] Having considered the evidence of PW2 as tested in cross-examination, the court finds that the deceased died due to head injuries sustained in a motor vehicle accident. The fact that a full post-mortem was

not conducted was not fatal to the prosecution case because PW2 testified that from the external physical examination she was able to conclude as follows:

> Untuk si mati saya tidak teruskan dengan pemeriksaan dalaman kerana melalui pemeriksaan luaran saya dapati saya jumpa punca-punca kematian dan tambahan si mati sebelum ini tidak mempunyai sebarang masalah kesihatan.

[24] The court also finds that the police's failure to send the deceased's blood sample for toxicology tests was not fatal to the prosecution case. In this regard, PW6 stated that "Sepanjang saya bertugas, jika mangsa atau pesalah yang tidak disyaki, kita tidak akan arahkan untuk ambil sampel. Berdasarkan keterangan saksi. Cara pemanduan si mati menunggang dengan baik." The court accepts PW3's evidence that he saw his son riding on his motorcycle while passing by the school where PW3 worked as a security guard and that the deceased was going back to work after Friday prayers. PW5 corroborated PW3's testimony to the extent that he encountered the deceased who was travelling back to work at DIY Kuala Kangsar on that tragic afternoon. There was no evidence to suggest that he was under influence of alcohol or drugs because even the appellant did not see the deceased until his motorcycle hit the lorry. This was pure speculation without more, but there must be some evidentiary basis to raise this as a reasonable against the prosecution case. In the absence of such evidence and premised on the above consideration, the court finds that the deceased had died due to injuries sustained in a motor vehicle accident. Therefore, the prosecution has also proved the third ingredient of the charge.

[25] The court now considers the third and most contentious part of the prosecution evidence *ie*, the second ingredient of the charge, namely, the manner of the appellant's driving which allegedly caused the death of the deceased. Let us revisit PW5's evidence in chief on what transpired that day as he rode behind the deceased's motorcycle. Earlier, he said he had known the deceased for about two months. On that fateful afternoon, after Friday prayers, PW5 was travelling on his grandfather's old motorcycle for a medical check-up at Hospital Taiping. He saw the deceased on a motorcycle going back to work at DIY Kuala Kangsar. Then the deceased's motorcycle overtook his motorcycle at a bend near the Jerlun Chinese School but it was not going fast and their distance then was about 5 meters away. After the bend about 10 meters behind the deceased, PW5 saw a lorry coming from the opposite direction and turned right into the driveway of the Jerlun Hardware shop. At p. 25 of the Record of Appeal Volume II, the witness stated:

> Lori itu masuk tanpa bagi signal. Saya tidak tahu kelajuan dia berapa. Dia masuk ke sebelah kanan. **Dia ada perlahankan kenderaan dia sedikit.** Tidak boleh hendak agak laju. (emphasis added)

[26] The court gathered that PW5 could not estimate the distance between the deceased's motorcycle to the lorry at that point but his own distance to the lorry was about 10 meters. He could see about 20 meters ahead of him. He continued:

> Laluan kami, iaitu saya dan si mati laluan menurun sedikit, selepas selekoh jalan lurus pendek. Lurus dalam 12 meter.
>
> Bila lori belok ke kanan, si mati terus langgar bucu kepala lori. Si mati rebah ke belakang dan motor masuk bawah lori.
>
> …
>
> Untuk laluan lori jalan adalah menaik. Menaik sedikit sahaja. Saya tidak tahu lori itu hendak "straight" atau hendak masuk sebab signal tidak bagi.

[27] At p. 28, PW5 stated "Semasa saya follow si mati had laju saya dalam 40km/j. Si mati bawa dalam 50 ke 60km/j. Sebab itu jalan straight." The witness was cross-examined on his testimony that it was illogical for him to be going for a medical check-up on a Friday afternoon at Hospital Taiping which was about 1 hour away and he was still travelling at a speed of 40km/hour. It was put to the witness that both of them were actually racing with each other. PW5 denied it as his grandfather's motorcycle was rather old and could not pick up much speed. He also denied that the deceased was going fast at that bend and which was why the latter crashed into the lorry. The witness however agreed that from the view point of the lorry, the appellant could see only about 10 to 15 meters ahead due to the road terrain sloping uphill. He disagreed that the lorry had actually signalled right as it was already in that position but he could not see it due to the angle of the lorry (turning right). He also agreed that he did not know the actual speed of the deceased's motorcycle prior to the accident. According to PW5, the dent on the lorry's upper part on the left was caused by the deceased's face hitting it and that the damage on the bumper was due to the collision with the motorcycle. PW5 further denied that he did not lodge a police report immediately as he had been racing with the deceased prior to the accident.

[28] In his re-examination, PW5 told the court that he did not lodge a police report as due to the chaos, he did not know what to do. He said that the deceased was on the right path right of way) and no one could have avoided the accident when the lorry turned right in the manner that it did. In regard to the inconsistency of the distance he gave, PW5 stated that he was only estimating based on what he saw and he did not take any measurement of distance. He was asked:

> S: Peguam kata kereta yang berada di belakang lori itu Nampak ada signal jadi sebab itu dia tidak langgar lori. Kenapa kamu tidak setuju. Kenapa?
>
> A: Mungkin kereta perasan yang lori itu bukan brek dahulu dan terus masuk sahaja. **Dia bawa perlahan dan dia boleh mengelak.**

S: Kamu tidak setuju kerosakan motor dan lori akibat daripada hentaman kuat akibat motor dibawa laju. Jelaskan. A

A: Sebab motor langgar bumper bawah sahaja. **Bahagian body lori kemek kena badan si mati.** (emphasis added)

[29] Meanwhile, the Investigation Officer (PW6) testified that she had been an experienced officer and had investigated 50 traffic accident cases since 2015. She testified that based on her investigation, the point of impact was at the motorcycle's legal path where the motorcycle hit the left side of the lorry's cabin. The only eyewitness was PW5. There were no brake marks on the road. Although she had tried spoken to some of the workers at the hardware store, none of them saw how the accident happened. She stated that any vehicle that was going to make a turn must turn in a safe manner and distance from on-coming traffic. However, she could not gauge the distance between the lorry and the motorcycle or the speed of the motorcycle before the collision. PW6 testified that based on the damages to the two vehicles, it was only a minor accident and not a strong impact. B C D

[30] According to PW6, when she arrived, the appellant was still at the accident site and later he lodged a police report at 17.09pm as per exh. D8 (Record of Appeal, Volume III at p. 8). In the report, the appellant stated that when he reached Km 5 Jalan Kuala Kangsar - Manong, he stopped the lorry and signalled right and when he made the turn there was no on-coming traffic. During the cross-examination, PW6 admitted that apart from the appellant's report, no other party had lodged a police report on how the accident happened and she also did not take any witness statement from any of the workers at the hardware store nor obtain any CCTV recording from there or JKR. She said even if there was CCTV at the store, it would be pointed to the hardware store entrance rather than to the road. She agreed that the appellant had told her that he stopped first and signalled before making the right turn. She denied that he told her there were other vehicles behind the lorry before he turned right. PW6 also denied that the deceased could have reacted by turning to the left to avoid the accident as the area on the left side of the road was vacant. E F G

[31] PW6 denied that the lorry was transporting some building materials which the appellant claimed were heavy to the hardware store. She claimed that the lorry was not carrying any cargo as can be seen in photographs in pp. 10 and 11 of the Record of Appeal, Volume III. However, she agreed that there was no reason for the appellant who lived in Kedah to suddenly go to the hardware store unless for one reason only which was to make a delivery of goods. PW6 disputed the delivery order that was produced by the appellant as ID9 because the document was not produced during her investigation. One of the questions she was asked was: H I

S: Sebenarnya saksi yang nampak adalah pekerja hardware Jerlun yang menunggu di hadapan pintu masuk hardware untuk memberi arahan kepada OKT tempat mana patut beliau masuk dan berhentikan lori?

A: **Ada puan. Tetapi saksi tersebut tidak nampak bagaimana kejadian berlaku bila saya ambil statement.** (emphasis added)

[32] PW6 also agreed to the counsel's suggestion that only the appellant knew how the accident happened and that when he turned right after signalling, he could not do anything more when the motorcycle of the deceased appeared suddenly because he had already made the turn. She also agreed that due to the slight hilly terrain, the appellant's line of sight was about 10 to 20 metres ahead. In regard to PW5's witness statement, she said his was taken about two weeks after the accident. She stated it was not required for PW5 to lodge a police report about the accident because she had taken his statement down in writing. She disagreed that the motorcycle was driven fast, although she did not send it to PUSPAKOM to test the brakes.

[33] In re-examination, PW6 stated that as a lorry driver, he should be more responsible in avoiding the accident because the motorcycle was in its legal right of way. If the deceased were to turn left, he would still not be able to avoid the accident. She clarified that as the motorcycle had the right of way, the issue of it being fast or slow did not arise. When she said that 100 metres being a safe distance, it was based on common sense. She explained that if it was a strong impact of the collision, the lorry would not have sustained such damages. However, she did not elaborate on the pattern of damages due to a high impact collision. She explained further that she did not request a toxicology test on the deceased's blood sample as she did not suspect him to be under the influence of drugs or alcohol.

[34] Now, obviously PW6 was not there at the accident site and did not see how it happened. Nevertheless, some of her evidence, namely, the silent evidence could throw some light on how it really happened. PW6 placed high reliance on PW5's evidence because he was the "sole eye-witness" and she had taken his statement down in writing two weeks after the accident. As the court went through PW5's testimony, there were some lapses which he tried to explain in re-examination. Nevertheless, looking back at the evidence of PW5 particularly in the paragraphs that had been highlighted earlier, the court viewed that the learned Magistrate did not properly consider PW5's statement in light of the appellant's defence.

[35] In the grounds of judgment (Record of Appeal, vol. I at p. 18, para. 15), the learned Magistrate stated that the appellant turned right at a distance without stopping and did not signal right. This conclusion was made based on the evidence of PW5 and PW6 which were supported by other documentary evidence. Nevertheless, upon perusal of the evidence before

the court, it is noted that PW5 stated at p. 25 of the Record of Appeal Volume II, "Dia ada perlahankan kenderaan dia sedikit." He slowed down a bit. This statement by PW5 to a certain extent corroborated the appellant's evidence that he did stop before he turned right. The appellant stated that he stopped and indicated that he was going to turn right by signalling right and then he made the turn. He was consistent in his defence when this was disclosed about two and a half hours after the accident in D8 and PW6 also admitted that the appellant told her about that. Instead, the learned Magistrate totally disregarded this piece of evidence and chose to believe PW5 and PW6 instead.

[36] The other matter which was a bit disconcerting was PW6's insistence (as well as PW5) that the deceased could not have avoided the accident even if he wanted to because he had the right of way. She stated that it did not matter whether the deceased was going fast or slow because it was his right of way. Surely one must act to save oneself by taking all necessary action to avoid an accident rather than to run into an on-coming vehicle more so when it was a big lorry such as the one in this unfortunate incident. Looking at the photographs and sketch plan, the court noted particularly the first photograph P3A (Record of Appeal Volume III, p. 10) it can be clearly seen that the area to the left of the road which side that the deceased's motorcycle was travelling was quite wide and it leads onto another smaller road *ie*, the slip road to the hardware store. PW5 stated that the deceased was going about 50 to 60 km/hours and about 10 meters ahead of him. Now if PW5 himself saw the lorry turning into that slip road, how come the deceased who was not travelling fast could not avoid the lorry by braking or turning slightly left? It was the most natural reflex to preserve one's life; unless he did not see the lorry in front of him. If that was the case, was he paying attention to the road in front of him? At most, the deceased might have sustained some injuries if he fell while turning left but his life would have most likely been saved. That was the missing link in the prosecution case and the court views that PW5's testimony was insufficient to prove that the manner of the appellant's driving was dangerous. Moreover, it was undisputed that it was the deceased that collided into the lorry and not the other way around.

[37] The court looked at an old Singaporean case for guidance on this issue of having the right of way. In *Lim Lim v. The King* [1937] 1 MLJ 81, McElwaine CJ held:

> It was argued that the appellant being on a main road had the right of way and that it was the duty of the car driver to keep out of his way. The accused said he kept straight and that he had the right of way.
>
> There is no general law in this Colony that a car on a so called main road has a right of way. Two intersecting roads may each be a main road though those roads may not be of equal width. Mr. Spenser Wilkinson referred to Mahaffy and Dodson's Law relating to Motor Cars, 3rd Edition, page 77.

A The Lord President (Lord Dunedin) expressed himself in very clear terms. 'The driver, he said, knew that he was going to cross at right angles to a very frequented and main thoroughfare; and if there is one rule more than another that it is necessary to lay down for the practical conduct of traffic, it is that it is the business of those who are on the cross road and going to cross the main road to look out when they enter the main road B and to give way to all traffic which is coming along the main road. Of course, there is a degree in everything. They have a right to cross the main road … but … where there is any possibility at all of collision it is the business of the person on the side road to give way to the person on the main road … *The 'rule' of which the learned Lord President spoke is one which commends itself strongly to practical men; but if it is read to mean that the driver* C *on a main road may keep his course and speed at crossings and assume that every vehicle debouching on to the main road has the duty of keeping out of his way it is 'put too high.' The rule does not absolve the main road driver from approaching the entrance to side roads with care and precaution.* Mr. Spenser Wilkinson also referred to the Highway Code prepared by the Traffic branch of the Straits Settlements Police at page 4.

D

> No vehicle has a 'right of way' at cross roads, but it is the duty of a driver on a minor road when approaching a major road TO GO DEAD SLOW and to give way to traffic on the major road. *Nevertheless drivers on a major road should always keep a sharp look out and drive cautiously at all road junctions.* (emphasis added)

E

[38] The prosecution maintained that the motorcyclist had the right of way, but the appellant was also on the main road wanting to turn into a slip road on his right. This court opines that if the deceased had taken the stand that "every vehicle debouching on to the main road has the duty of keeping out of his way, it is putting it too high". He should always keep a sharp look out F and drive cautiously at all road junctions, and in this case, he was approaching the slip road leading to the hardware store. While PW5 insisted that the deceased was not riding fast, to a question in re-examination he stated "Mungkin kereta perasan yang lori itu bukan brek dahulu dan terus masuk sahaja. Dia bawa perlahan dan dia boleh mengelak." The court could not G resist the inference in that PW5's last statement in that the deceased was not riding slow and he could not avoid the lorry as opposed to the driver of the car that was behind the lorry at the material time. The absence of any brake marks did not indicate that he was riding at a slow pace or that he could not have avoided the lorry. The court can only draw an inference that, based on H the sketch plan (Record of Appeal Volume III at p. 5) and the point of impact on the lorry as well as the position of the deceased's body on the road, the motorcycle was not going at 50 to 60km/hour then. It had to be faster than that what PW5 testified. Moreover, PW5 also could not for sure tell what was the real speed of the deceased when the latter was ahead of him. It was I just his own estimate and unsupported by PW6 in that regard.

[39] If he was not going fast, the impact with the lorry's outer cabin would have thrown him on the road but the injuries would not have been severe as stated by PW2. PW2 stated that the deceased had sustained severe head injuries and he broke a neck bone. There were a lot of injuries on his face and facial structural defects. Based on her evidence, the court gathered that his right arm and right leg were not injured but his left arm and left leg were badly injured. It seemed that the left knee hit the lower part of the lorry's body hence, the deep cut in the left knee. Therefore, his left part of the body collided into the lorry's outer cabin in what may have been a last-minute attempt to swerve to the right. The position of the lorry which was fully across the left lane and the appellant immediately stopped his vehicle upon feeling the impact of the collision leads this court to conclude that there must be some truth to the appellant's version. He may or may not have given that signal to turn right, but there was evidence that he slowed down and then he turned into the slip road. The silent evidence in P3A (the photograph) can only point to one conclusion that there was negligence on the part of the deceased as well when seeing the lorry fully across the left side of the road, he did not slow down or take proper steps to avoid the lorry. PW5 stated that the deceased was only about five meters ahead of him (notes of evidence at p. 25). The learned Magistrate's conclusion that the appellant's failure to signal right and to ensure there was no on-coming traffic, was dangerous driving in the circumstances of the case could not be sustained.

[40] The other point that the court wishes to address is on the issue of the lorry allegedly carrying a heavy load at that time. PW6 stated that the appellant's lorry was not carrying any load but she admitted that there was no reason why he would be going to the hardware store unless he had a drop off to make there. Then she agreed to counsel's suggestion that there was an employee waiting at the entrance of that slip road which was waiting for the lorry driven by the appellant to direct him inside. She claimed that the lorry was not carrying any cargo as can be seen in photographs in pp. 10 and 11 of the Record of Appeal, Volume III. However, the court cannot agree with this witness's conclusion that the lorry was not carrying any heavy load at the material time because the court could not tell from the photographs whether it was carrying any load. To be fair to the appellant, the photographs were taken from the side of the lorry and not from inside the cargo area or above it.

[41] The appellant had suggested to the prosecution witness as early as the cross-examination of PW5 and PW6 that he had been carrying a heavy load and he was there to make a drop off, which was why he could not have driven fast. PW6 also admitted that she did not contact the owner of the hardware store as she did not see it necessary to do so because he was not there. However, the court agrees with the appellant's contention that in this regard, PW6's investigation was incomplete when she did not verify further with the

employee that she interviewed at the hardware store that the appellant was there to make a drop-off. The Delivery Order (ID9) was tendered during the defence's case but the prosecution witnesses (PW5 and PW6) were asked about the lorry being driven slow due to the heavy load it was carrying. It cannot be said then this was an afterthought on the part of the defence. The court will consider this piece of evidence later. There was an inference which favoured the appellant, and the learned Magistrate did not properly consider this inference when calling for the defence under s. 41(1) of the Act.

[42] In the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393 which discussed the meaning of *prima facie* case, the Federal Court held:

> For the guidance of the courts below, we summarise as follows the steps that should be taken by the trial court at the close of the prosecution's case:
>
> (i) The close of prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> (ii) Ask yourself the question, "if now I call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is yes", then a *prima facie* case has been made out and the defence should be called. If the answer is no, then a *prima facie* case has not been made out and the accused should be acquitted.
>
> (iii) After the defence is called, the accused elects to remain silent, then convict;
>
> (iv) After defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263.

[43] This court views that the learned Magistrate at the end of the prosecution case fell into error by not making a full evaluation of the prosecution case despite stating so in para. 24 of the grounds of judgment (Record of Appeal, Volume I). If this had been done and the evidence properly evaluated, the learned Magistrate would have called evidence on the lesser charge of s. 43(1) instead. This court finds that the Magistrate did not make a finding of fact that the slightly hilly terrain of the accident site had to a certain extent limited the appellant's view as he was going uphill whereas PW5 had a better line of sight as they (he and the deceased) were going slightly downhill. There was no dispute that the line of sight of the appellant was roughly 10 to 20 meters ahead because of the slight bend and uphill terrain. To my mind, this fact supported the appellant defence that had been raised earlier that he had determined there was no on-coming traffic

after he stopped and signalled to turn right. The defence only needs to raise a reasonable doubt that he had given the signal to turn right but it was unlikely to be seen by on-coming traffic when the position of the lorry was already across the left lane of that road. The court gives the benefit of doubt to the appellant as looking at the lorry, it was quite a big-sized five tonnes vehicle (according to the appellant at p. 79 of the notes of evidence and which was not challenged) and the signal light position on the lorry's outer cabin was located on its lower part almost at the side (refer to photograph P3B). The appellant stopped it immediately when he heard the sound of the collision. The position of both vehicles was exactly as they were upon impact and there was no evidence that they had been moved at that point in time.

[44] Now, the court will go on to consider the appellant's defence's case. The appellant testified that he held a Class E licence and had been driving big lorries for 20 years. He had been transporting goods to Ng Chin Hong Hardware in Jerlun for the past four years prior to the accident. He would make deliveries there approximately three to four times in a month. He was familiar with that road and always made deliveries at the hardware store. On that day, the appellant had made deliveries using the motor lorry with registration no. PHC 449 in Taiping and Lenggong and his next stop was Kuala Kangsar, *ie*, the hardware store in Jalan Kuala Kangsar – Manong. Before arriving in front of the place, he signalled right and stopped the lorry. He said the road in front was empty. As he turned right into the slip road, he heard a bang near the left side of the lorry and he went down to check. He saw a motorcycle 125z beside the front left door and it had slid under his lorry. He saw a person lying in front and then people from the hardware store and passers-by arrived. He said he was there until 6pm but it is noted that his police report was lodged at 5.09pm. He was asked to drive his lorry to the police station and it was left there. The unloaded goods were offloaded and transported by another lorry to the store.

[45] The appellant testified that his view was about 10 to 15 meters ahead when he was in the cabin of the lorry at the accident site due to the slightly hilly terrain and the lorry was going uphill. As he was transporting heavy load, he said the lorry was moving slowly while turning right. He said if he had seen the motorcycle, he would have been able to stop the lorry and avoid an accident if he had not turned. Since he had already turned right, his lorry was already across the lane and obstructing traffic. He could not have accelerated as the lorry was heavy and it could overturn if he were to suddenly turn fast. The appellant then referred to the delivery order dated 8 June 2018. The prosecution objected to the document being marked as the maker, which was from Astino Colour Steel Sdn Bhd (the appellant's employer) was not called to tender it. The document was then marked as ID9 (Record of Appeal Volume III at p. 9). It listed some items there for delivery to Ng Chin Hong Hardware. Nevertheless, as it was not marked as evidence,

A the court could not determine the truth of the contents of that delivery order. The appellant agreed that he did not at any time surrender the document to PW6. He stated that the lorry was in good working condition when he drove it prior to the accident. He had never been charged in court for any offence.

B **[46]** In his cross-examination, it was put to the appellant that he was not careful enough when he made the right turn into the hardware store area because he did not give a signal that he was going to make a right turn and that he did not stop first. Or that he had ensured there were no oncoming traffic. It was also suggested to the appellant that if there were indeed goods in the back of the lorry, they could be seen in the photographs, and the C appellant disagreed with the statement. He disagreed that the damages to the motorcycle was minimal because the vehicle slid under the lorry and the damages were extensive (refer to photographs P3E and P3F). He disagreed that he could turn into the slip road in 1 to 2 seconds as the lorry was not loaded. He denied that he did not stop at all or that he did not indicate he D was turning by signalling right with the indicator or that he made a sudden move to turn right. The appellant denied that he did not stop when he was turning right because he thought he could pass through before the motorcycle. He disagreed that on that day, from a distance of 10 to 15 meters he could see the motorcycle coming front the opposite direction before E proceeding to turn right anyway.

[47] During re-examination, the appellant told the court that he did not give ID9 to PW6 because she never asked for the document. He clarified that on that day, he did not see the deceased's motorcycle coming from the opposite direction. He had waited in front of the slip road and only turned F right when he had determined that the road was clear of traffic. In regard to the lorry's heavy load which he claimed he was transporting on that day, the appellant explained that the goods were flat and heavy and therefore they could not be seen in the photographs as the side of the lorry were quite high. On the document ID9, the appellant stated that it was issued by his company G and he would only know its content when he sees the document, who was the owner of the goods and destination. The defence then closed its case. Counsel informed the Magistrate that it was difficult to call the company's representative to court and they would close their case if the appellant was unable to arrange for the appellant's witness to come. He told the court that there was an eyewitness at the hardware store but as the person was just a H customer, and they did not have the person's details, it was difficult too to call the person to testify in court.

[48] Evaluating the evidence given by the appellant, despite the cross-examination by the prosecuting officer, this court finds that the appellant is I a truthful witness. There was a discrepancy that he was there until 6pm but this was not a material contradiction. At 5.09pm he was already at the police station to lodge a police report, about two and a half hours after the accident

and in D8 he had given his version of events. Whereas PW5 only went to give his written statement to PW6 some two weeks the accident and it was not sufficiently explained the delay in taking down his witness statement. Although the appellant was not able to produce the maker of the document ID9, the court assessed his testimony based on the overall evidence of the prosecution and defence cases rather than on ID9. The court found that the appellant's defence that his lorry was making a stop at the hardware store was not challenged by the prosecution. In fact, PW6 admitted that she had interviewed a worker there who was waiting for the appellant. He was turning right for a valid reason, although he could not prove the contents of the delivery order, and he had as much right to use the road as any other road user. Nevertheless, from PW5's testimony which stated that the accident occurred very fast, within three seconds, lent some credence to the appellant's evidence that he could not turn the lorry fast as the lorry was carrying a heavy load. After about three seconds, the lorry was only across the left lane of that road and had not completely crossed into the slip road of the hardware store. Earlier, PW5 told the court that the lorry had slowed down before it made that turn. The court viewed that from where he was situated, PW5 had seen the lorry arriving at the junction into the slip road even before it slowed down.

[49] Considering the line of questioning of the defence, the court found that he had raised a reasonable doubt in that the appellant had a limited vision of about 10 to 20 meters ahead because of the slight bend and uphill terrain. The appellant stated he had determined there was no on-coming traffic after he stopped and signalled to turn right. The defence only needed to raise a reasonable doubt that the signal to turn right was unlikely to be seen by on-coming traffic when the position of the lorry was already across the left lane of that road (refer to photograph P3A). Nevertheless, the appellant admitted under cross-examination, if he had waited longer at 10 to 15 meters, he could have been more careful as compared to a further distance away. And if he had signalled and stopped before making the turn, he would have more time to see the motorcycle coming from the opposite direction (p. 82 of the notes of evidence).

[50] Referring to *Mohd Radhi Yaakob*'s case (*supra*) in which the Supreme Court stated:

> In this connection, counsel for the appellant had referred to us the case of *PP v. Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. *We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in Mat v. PP [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even*

though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. *To earn an acquittal at the close of the case for the prosecution under s. 173(f) or s. 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (Munusamy v. PP [1987] 1 MLJ 492). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.* (emphasis added)

[51] In the present case, the learned Magistrate did not state in the grounds of judgment why the defence case had failed to raise a reasonable doubt on the prosecution case (refer to para. 31 of the grounds of judgment). The learned Magistrate agreed with the prosecution's submission that the deceased was on his original path and it was the appellant who should have been more careful. The burden should not be placed on the deceased, it was contended. She made a finding that the appellant was careless by driving in a dangerous manner when he failed to see the presence of the motorcycle before he departed into the deceased's lane. Applying the principle in *Mat v. PP* [1963] 1 LNS 82 above, this court finds that the Magistrate had committed an error of law when making the statement because it was obvious that she had placed a greater burden on the defence to prove his innocence when in law, he needed only to raise a reasonable doubt on the prosecution case. This court finds that the defence's duty to cast a reasonable doubt in the prosecution case under s. 41(1) of the Act has been made out successfully as discussed above. He is not required to prove his innocence beyond reasonable doubt. Moreover, this court is of the view that the appellant's

testimony is not materially contradicted by his own evidence or that of the prosecution's. In fact, as stated earlier, some of the prosecution evidence also corroborated the appellant's testimony in court. Therefore, this is a suitable case for appellate interference because the learned Magistrate has failed to properly appreciate the defence case in light of the gaps in the prosecution case.

[52] Having said that, the court nevertheless found that the appellant was careless (not reckless) when he made the turn into the slip road. He admitted that had been transporting goods to Ng Chin Hong Hardware in Jerlun for the past four years prior to the accident. He would make deliveries there approximately three to four times in a month. He was familiar with that road and always made deliveries at the hardware store. Based on PW5's evidence, the appellant had slowed down a bit and then turned right. The prosecution suggested to the appellant that he wanted to pass through to the slip road before the motorcycle came as he thought he would be able to make it. In my opinion, based on the appellant's admission, being familiar with that road, the appellant thought he would be able to turn right by just slowing down a bit (rather than fully come to a stop) and then turning into the slip road. It may well have been that he did not see the motorcycle coming because otherwise he would not have turned right if he had seen it coming from the opposite direction. The court found that the appellant was careless in his action rather than reckless. The court had earlier made a finding that the deceased was also careless because having the advantage of the view coming down the slope, he should have been able to see a big lorry in front of him at the material time and slowed down by braking or take steps to avoid it.

[53] Counsel for the appellant urged the court to allow the appeal against conviction or alternatively find him guilty under a lesser offence as provided by s. 41(4) of the Act *ie*, under s. 42 or 43. He should not be made responsible for a higher degree of culpability when the deceased was also to blame for the accident. Counsel referred to the case of *Gunasegaran Singaravelu v. PP* [2009] 7 CLJ 613, which the court noted that there were many errors made by the Magistrate in that case and the High Court had overturned the Magistrate's decision as it was unsafe due to the Magistrate's failure to properly consider all the evidence available before it. It is stated in that case that the essence of the charge against the appellant is dangerous or reckless driving. It has repeatedly been held that driving is not necessarily reckless or dangerous because it leads to fatal consequences but guilt could only ensue if it is proven that the driving was reckless or dangerous. The charge is not one of causing death, but of driving dangerously or recklessly. See for example, *Tan Thang Sang v. PP and Choong Sze Foong v. PP* [1973] 1 LNS 158; [1975] 1 MLJ 204.

[54] The case of *Gunasegaran Singaravelu* (*supra*) referred to *PP v. Zulkifli Omar* [1998] 1 CLJ 1079; [1998] MLJ 65, at pp. 71 to 72, Vincent Ng J (as he then was) said as follows:

> The *dictum* of Lawton LJ in the English Court of Appeal decision in the celebrated case of *R v. Guilfoyle* [1973] 2 All ER 844 – which concerned a lorry driver who was convicted of causing death by dangerous driving is illuminating. He had this to say (at p. 845):
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> > Cases of this kind (causing death by dangerous of reckless driving) fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment (hereafter called 'the first category'), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety or other road users or of this passengers, with a degree of recklessness (hereafter called 'second category').
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> This distinctive categorisation of dangerous driving was discussed with ready approval by Ong CJ (Malaya) in the cases of *Tan Thang Sang v. PP*; *Choong Sze Foong v. PP* [1975] 1 MLJ 204. See also *R v. Boswell and other appeals* [1984] 3 All ER 353 (CA). And more recently, in 1993 this categorisation was also adopted in my decision on *Goh Kheng Seong v. PP* [1993] 1 MLJ 103. It is precisely in recognition of this distinction between the two categories of offences under s. 41(1) for causing death by reckless or dangerous driving, that the Legislature has, in all its wisdom, made express provision under s. 41(4) that:
>
> > The court may upon the trial of a person for an offence under this section s. 41(1) convict such person of an offence under section 42 (dangerous and reckless driving but without causing death) or section 43 (driving without due care and attention or without reasonable consideration.)
> >
> > …
>
> In an offence under s. 41(1), excessive speed is not the sole decider of reckless driving but there must also be a finding on the manner and other aspects of the defendant's driving which constituted recklessness, by having regard to the prevailing circumstances at the material time of accident, including the nature, condition, and size of the road, and the amount of traffic which is or might be expected on the road. The risk created by the manner in which the vehicle is driven must be both obvious and serious, and the court has to be satisfied that the essential or core ingredients of recklessness have been proved beyond reasonable doubt. (see also *Ramiah v. Public Prosecutor* [1972] 2 MLJ 258).
>
> The learned Magistrate has obviously failed to direct his mind to the law in this case and had been unduly influenced by the fact that there had been a death. This is a nondirection which amounts to a misdirection.

[55] In the case of *Wan Khairil Wan Isa*, the High Court having called for the defence of the respondent, stated the following:

> [62] It must be emphasised that that the foregoing conclusion only has the effect of calling upon the respondent to put forward his defence to the charge preferred against him. It does not have the effect of deciding that he is in fact guilty of an offence under the said section. Neither do these grounds of judgment constitute any form of direction to convict the respondent on any charge. It is open to the court below to come to a conclusion at the end of the defence case that indeed the respondent has a full and complete defence to the charge under s. 41(1) of the Act or to convict the respondent under the lesser charges provided for in s. 42 and 43 of the Act. Accordingly it is ordered that this appeal be allowed and the matter remitted to the Magistrate's court for defence to be called.

[56] There, the High Court found that the reckless manner of the respondent's driving had established a *prima facie* case for his defence to be called. Nevertheless, as the law provides for it, the courts can conclude that the accused has a full and complete defence under s. 41(1) or a discretion to convict under a lesser charge of s. 42 or 43 of the Act where appropriate. This court finds that the appellant has a complete defence to a charge under s. 41(1) of the Act despite the death of the deceased. It must be remembered that the charge is not one of causing death, but of driving dangerously or recklessly. The learned Magistrate had imposed an extremely high burden of proof on the appellant and the judgment was clouded due to the deceased's death. Under s. 41(1), the duty lies on the prosecution from the beginning to the end to prove the charge against the accused beyond reasonable doubt. This exercise requires the trial judge to scrutinise the totality of the evidence in order to determine whether the ingredients of the charge have been made out. Hence, a careful perusal and evaluation of the evidence of each witness and testing them against all the other evidence as a whole was imperative.

Conclusion

[57] The punishment for an offence under s. 43(1) prior to the amendment in 2020 is a fine of not less than four thousand ringgit and not more than ten thousand ringgit and shall also be liable to imprisonment for a term not exceeding 12 months. In the upshot, the conviction of the appellant is substituted for a conviction under s. 43(1) of the Act. Having heard the parties on the aggravating factors and mitigation, the accused is sentenced to a fine of RM10,000, in default of payment, one year imprisonment. Particulars of offence and conviction to be recorded into the driving licence of the appellant by the Road Transport Department accordingly.

[58] The case of *Goh Kheng Seong v. PP* [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408; [1993] 1 MLJ 103 discussed whether the words "shall on conviction be liable to a term of imprisonment … or to a fine … or to both" in s. 34A(1) of the Road Traffic Ordinance 1958 do make a term of imprisonment mandatory. The learned High Court Judge answered this question in the negative as the wording in this section clearly provides for

A the option of a fine. (See *PP v. Hew Yew* [1971] 1 LNS 110; [1972] 1 MLJ 164). It was stated further that "By way of an observation, it is worthy to note that the words 'shall be liable … to imprisonment', with or without the option of a fine does not overrule the exercise of the sentencer's discretionary powers under s. 294 of the Criminal Procedure Code (FMS Cap 6) ('the
B CPC'), upon sensible interpretation of the expression 'be liable' …". In the present case, the sentence of the maximum fine imposed upon the appellant is more suitable as he had gone through a full trial.

[59] In my view, an offender who has been convicted because of momentary inattention or misjudgment and who has a good driving record
C should be fined. There is no requirement under the law in 2018 for the appellant to be disqualified from holding a driving licence for a minimum statutory period under s. 43(1), only for it to be endorsed. Nevertheless, the appellant was warned by this court and the maximum fine of RM10,000 would serve as a deterrence to him and other road users to be more careful
D on the road when driving a motor vehicle. Even if this court is wrong to substitute the charge for one under s. 43(1), it is my humble view that given his good driving record and no previous conviction adduced by the prosecution, the appellant's age factor, being the sole bread winner of his family and has shown remorse, and considering also that it was not pre-
E meditated offence, a long custodial sentence would not be in the best interest of justice for all.

[60] The appeal is allowed in part.

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